No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

GENERAL ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington 6, D. C.

Attorneys for Petitioner.

HERBERT L. SEGAL,
[illegible] Republic Building,
Louisville, Kentucky,

Of Counsel

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GENERAL ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, prays that a writ of certiorari issue to review the decision and decree of the United States Court of Appeals for the District of Columbia Circuit, entered on April 18, 1960, enforcing an unfair labor practice order issued by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court below (Appendix A. *infra*, pp. 19-25) is reported at 278 F. 2d 282, —U.S. App. D.C. —. The Decision and Order of the Board (J.A. 37-46)[1] are reported at 123 NLRB No. 180.

[1] The reference "J.A." designates the portion of the record printed as a joint appendix to the briefs of the parties in the court below.

JURISDICTION

The decision and order of the court below (Appendix A, *infra*, pp. 19-26) were entered on April 18, 1960, and its decree (Appendix A, *infra*, pp. 27-28) on May 18, 1960. On July 8, 1960, by Order of Mr. Justice Black, the time for filing the Petition for Writ of Certiorari herein, was extended to August 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(e) and (f), hereafter called the Act.

QUESTION PRESENTED

Whether a union violated Section 8(b)(4)(A) of the National Labor Relations Act, by picketing at a gate to an Employer's manufacturing plant premises where (1) the Employer had restricted the use of that gate to employees of independent contractors working on the Employer's premises, (2) the Union was engaged in a labor dispute with the Employer whose employees the Union represented, and (3) the Union was simultaneously engaged in picketing at all other entrances to the Employer's plant premises.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in Appendix B, *infra*, pp. 29-30. This case arose and is governed by the provisions of the Act as they appeared prior to amendments of 1959.

STATEMENT

A. The Facts

Petitioner has been, at all time material, the collective bargaining agent for the production and maintenance employees at the General Electric Company's Appliance Park, Kentucky installation (J.A. 38; 49). Appliance Park is composed of 13 buildings, located in a 1000 acre tract (J.A. 38; 51). Six of the 13 buildings are used directly for manu-

facturing and the other buildings augment this function (J.A. 38; 51). At the time of the events herein, there were approximately 10,500 people employed by General Electric Company, Intervenor below, in Appliance Park, about 7600 of whom were in the collective bargaining unit (J.A. 38; 61).

Appliance Park is located about 10 miles from Louisville, Kentucky, and the overwhelming majority of the employees drive to work by private car (J.A. 38; 57). Access to Appliance Park by automobile can be obtained through any of five gates (J.A. 38; 52). Once a car enters any of these gates, there is no impediment to movement between buildings (J.A. 64-65, 115).

One of the five gates to Appliance Park is named gate 3-A (J.A. 38; 49). This gate had been designated by General Electric for the use of employees of independent contractors who do work for General Electric in Appliance Park (J.A. 39-40). General Electric asked the contractors to have their employees use gate 3-A because General Electric hoped that, in the event of a strike of the employees of any of the contractors, the union on strike would restrict picketing to this gate and not picket the other gates at Appliance Park, and thereby impede General Electric's employees from using the other gates (J.A. 39; 66, 179). A sign was placed over the gate which read:

"Gate 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES" (J.A. 40; 140, 170)

Instructions were given to plant guards to direct General Electric Company employees who might appear at gate 3-A to use other gates, but General Electric employees were not informed that these instructions were given (J.A. 58-60).

The guards were employed and supervised by General Electric Company (J.A. 68-69, 165-166).

On July 27, 1958, employees represented by Petitioner instituted a lawful strike based on 24 unresolved grievances (J.A. 41; 49). On the morning the strike started, pickets were stationed at all five gates leading to Appliance Park (*ibid.*). General Electric did not make any offer to Petitioner to restrict gate 3-A to contractors employees during the strike nor did it take any steps to insure such restrictive use of the gate (J.A. 20; 134-136).

The pickets at all gates carried similar signs which read:

"Local 761
ON STRIKE
GE UNFAIR" (J.A. 41; 133-134)

Neither the signs, nor the statements made by the pickets, nor Petitioner's representatives, indicated that any employees other than those of General Electric were on strike at Appliance Park. There is no evidence that Petitioner, or any of its representatives, approached the unions which represented the contractors' employees to solicit cooperation in causing a cessation of work at Appliance Park. Contacts between Petitioner and the contractors' employees occurred as the contractor's employees individually or in one instance in a group of three approached the gates of Appliance Park. In a few instances, contractors' employees and supervisors appeared on their own initiative at Petitioner's headquarters. (J.A. 41; 78, 79, 85, 87, 88, 97, 98).

The independent contractors were engaged to perform maintenance and construction work, in many instances identical to the work which the General Electric employees could, and did, perform (J.A. 15-16; 56, 62, 84-85, 147). The majority of the work done by the independent contractors' employees was performed in the manufacturing

building where Petitioner's members normally work (J.A. 62-63). Some of the work which was to be done by the contractors was on projects for which estimates were received both from the General Electric maintenance division in Appliance Park and also from outside contractors, and the outside contractors submitted the lower bid (J.A. 15; 124-125). In one instance, the GE maintenance division had been given the assignment but lacked sufficient personnel to complete the work, and an outside contractor was given the assignment (J.A. 15).

At the outset of the strike and through its entire course, i.e., July 27, 1958-August 10, 1958, General Electric made public solicitations to its employees to go through Petitioner's picket lines to work (J.A. 135). Approximately 2000 of the 7600 employees in Petitioner's bargaining unit did, in fact, go through the picket lines and perform work during the strike (J.A. 18; 63). In addition, some of the contractors' employees also went through the picket line and performed work (J.A. 41; 75, 116).

Most of the employees of the independent contractors declined to work at Appliance Park during the strike (J.A. 18, 41, 85-87). Some of them asked Petitioner for passes to go through the picket line to secure personal tools which had been left in the plant. Such passes were issued on request (J.A. 18, 82, 97). Many of the contractors' employees who did not cross the picket line at Appliance Park during the strike were dispatched by the contractors to other projects on which each contractor was then working (J.A. 78, 83). None was asked by Petitioner to refuse to perform such work. Picketing at gate 3-A was enjoined by decree of the Federal District Court on August 9, 1958, and was stopped on that date (J.A. 41; 134).

B. The Trial Examiner's Findings and Conclusions

The Trial Examiner found that Appliance Park was not a "commons situs" occupied by both General Electric Company and its contractors, and that General Electric Company does not "share its premises" with the contractors (J.A. 21-22). Accordingly, he found that this picketing at the primary employer's place of business was not a secondary boycott. He found that gate 3-A was merely an access to the primary site of the labor dispute, and consequently regardless of whether it was customarily used exclusively for the independent contractors' employees, Petitioner had a right to picket the gate. He further found that the object of the picketing was to halt the operations of the struck plant by appeals directed collectively (a) to the Company's employees at gates 2, 3, 4, and 5, (b) to the consuming public at all gates, (c) to secondary employees who were engaged in transporting raw materials and finished products and who used gates 3 and 4, and (d) to the contractors' employees at gate 3-A. He found that there was no intent to induce or encourage the secondary employees to cease work at any place other than at Appliance Park. He concluded that appeals to secondary employees were "valid primary activity with secondary effects". (J.A. 34.)

C. The Board's Conclusions and Order

Respondent Board found that Petitioner violated Section 8 (b) (4) (A) of the Act. Without finding that the Employer's premises were a "common situs," Respondent found that Petitioner's object in picketing gate 3-A was "to enmesh these employees of the neutral employers in its dispute with" General Electric Company (J.A. 42). The Board ordered that Petitioner cease and desist from such activity.

D. The Decision of the Court Below

The court below granted enforcement of the Board's order and denied Petitioner's petition for review. The court held that the ultimate determination depended upon the objective of the Union's activity at Gate 3-A. In the court's view, this case raised only a substantial evidence question, and the court rejected Petitioner's contention that a critical question of statutory interpretation was involved. The court concluded that there was substantial evidence to support the conclusion that Petitioner's objective was to encourage the employees of the neutral employers to engage in concerted refusal to perform services in the course of their own employment. The court concluded that "The 'fine' line must be drawn in favor of the Board's order," and affirmed the Board's finding that Petitioner's picketing at Gate 3-A violated Section 8 (b)(4). The court rejected Petitioner's contention that its conduct constituted lawful traditional primary activity. (Appendix A, *infra*, pp. 19-25).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below is in Conflict With Decisions of this Court.

The conclusion of the court below that the inducement of employees of the independent contractors at Gate 3-A violated Section 8(b)(4) is in conflict with the decision of this Court in *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665. There the question squarely raised before this Court was whether inducement of employees of neutral employers to refuse to enter a struck employer's premises violated Section 8 (b)(4) of the Act. There the striking union directly and forcibly induced and encouraged two employees of a trucker not to enter a struck plant and thereby to refuse in the course of their employment to transport articles for their employer for the purpose of forcing him

to cease doing business with the struck employer. This Court held that:

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore such actions do not come within the proscription of Section 8 (b)(4), and they do not here."

In the instant case, the picketing at the segregated Gate 3-A, where contractors' employees entered, cannot be distinguished in any material respect from the inducement of the employees of neutral employers in the *Rice Milling* case. In both cases, the inducement of employes of neutral employees occurred at the primary employers' premises and was restricted to appeals not to enter the primary employers' premises. There were no inducements of employees of neutral employers to refuse to perform services at any other location.

In disposing of the *Rice Milling* case with the single observation that "This was no case of a union's seeking 'to influence two employees of a customer of the mill not to cross the picket line'," the court below has misinterpreted this Court's decision in the *Rice Milling* case and its decision in *N.L.R.B. v. Denver Building Trades Council*, 341 U. S. 675. While the *Rice Milling* decision was based on the absence of inducement of a "concerted refusal" to perform services, it was not based on the fact that only two secondary employees were involved. Any number of employees greater than one may engage in concerted activity. As the Board observed in its decision in *United Electrical Workers (Ryan Construction Co.)*, 85 NLRB 417, cited by this Court at footnote 6 of its *Rice Milling*

opinion, where the facts were strikingly similar to those of the instant case, "It makes no difference whether 1 or 100 other employees wish to enter the premises". Rather the finding that there was no inducement of a concerted refusal rested upon the principle "that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill." *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675, 687. Far from viewing the appeal to employees of neutral employers in the *Rice Milling* case as a limited exception to a sweeping proscription against picketing, this Court in *Rice Milling* took pains to observe that Section 8 (b)(4) must be narrowly and strictly read as a dimunition of the union's traditional right to strike, guaranteed by Section 13 of the Act. Fundamental to the conclusions reached in the *Rice Milling* decision is the fact that the picketing there under scrutiny was "in a manner traditional in labor disputes":

This interpretation of Section 8 (b)(4) and the *Rice Milling* and *Denver Building Trades* decisions was previously accepted by the court below in its majority opinion in *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 89 U.S. App. D. C. 155, 191 F. 2d 642 (C.A. D.C.), cert. den. 342 U.S. 869. In sum, the conclusion of the court below is in direct conflict with the holding of this Court, previously accepted by the court below, that inducements directed at employees of neutral employers as they approach the picketed premises of a struck primary employer, are traditional appeals which are encompassed by the right to strike guaranteed by Section 13 and not interdicted by Section 8(b)(4).

2. The Decision of the Court Below is in Conflict with Decisions of Other Circuits.

The decision of the court below is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Local 618, Automotive Employees Union* v. *N.L.R.B.*, 249 F.2d 332 (C.A. 8), and the decisions of other circuits interpreting the *Rice Milling* decision. In the cited case, the striking union had a dispute with the operator of fourteen retail gas stations in the St. Louis area. After a period of picketing all fourteen stations simultaneously, the union began picketing the stations intermittently with roving pickets moving from station to station. Thereafter, the Company closed one of the stations, withdrawing all its employees, with the intention of rebuilding the station and reopening the station after the completion of construction. Following the closing of the station, the striking union picketed at that station when employees of contractors arrived at the site to engage in the construction work.

Despite the absence of any employees of the primary employer at the site of the station and the availability of thirteen other stations in the area at which picketing could be carried on, the court concluded that the picketing at the closed station did not violate Section 8(b)(4). The court found that the inducement of the contractor's employees did not differ materially from that in the *Rice Milling* case, but that even if it were assumed that there was inducement of a concerted action on the part of the contractor's employees, the picketing was not proscribed. It held that in the case of a continuing strike at a primary employer's premises, it is insufficient to find that an object of the striking union is to compel the neutral employees to cease doing business with the struck employer. In such circumstances, the court concluded, in order to sustain a finding that Section 8(b)(4) had been violated, the Board must

establish that the picketing had no legitimate purpose in connection with the primary strike.

In both the instant case and the *Local 618* case, the picketing was carried on at locations at which employees of the primary employer were not likely to enter the primary employer's premises because of action taken by the primary employer. In both cases there were other entrances to premises occupied or used by employees of the primary employer at which picketing was carried on, and the primary dispute was publicized.

Other circuits, while not confronted with similar facts, have indicated similar views of Section 8(b)(4) and the *Rice Milling* decision. In *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F.2d 65 (C.A. 2) the Court of Appeals for the Second Circuit stated with respect to the holding in *Rice Milling:*

> "We take this to mean that a union may lawfully inflict harm on a neutral employer, without violating Section 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business."

Likewise, in *Piezonki* v. *N.L.R.B.*, 219 F.2d 879, (C.A. 4), the Court of Appeals for the Fourth Circuit stated:

> "This is not a case like [International Rice Milling] where the picketing was directed solely at the manufacturing company whose plant was picketed and where interference by the picket line with trucks attempting to make deliveries to the plant was incidental to the primary picketing."

In *Retail Fruit and Vegetable Clerks Union, Local 1017* v. *N.L.R.B.*, 249 F.2d 591 (C.A. 9), the Court of Appeals for

the Ninth Circuit in finding a violation in circumstances which it described as "unique" focused upon the statement of this Court in its *Rice Milling* decision "That Congress did not seek by Section 8(b)(4) to interfere with the ordinary strike."

The inapplicability of Section 8(b)(4) to the instant case is also reflected in the general statement of this Court in *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, that Section 8(b)(4) was "aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods."

3. The Decision is Not Affected by Amendments to the Statute.

The question presented in this petition continues to be of importance. The 1959 amendments to Section 8(b)(4) make no change material to this question. Insofar as material Section 8(b)(4) now provides:

"8 (b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is: . . .

(B) forcing or requiring any person to cease using,

> selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of this title: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .
>
> "*Provided*, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter . . ."

While the *Rice Milling* decision speaks of "concerted refusal", the words which appeared in Section 8(b)(4) prior to the amendments, the deletion of the word "concerted", for the purpose of interdicting appeals to individual employees to engage in secondary activities away from the primary employer's premises, was not intended to restrict the scope of traditional primary picketing. This intent is made clear by the addition of the proviso to the present Section 8(b)(4)(B): "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The legislative history pertaining to this proviso shows that it was intended "to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the

site of a primary labor dispute." Conference Report, H. R. No. 1147 on S. 1555, 8th Cong., 1st Sess., p. 38. See also: 105 Daily Congressional Record 15905, August 28, 1959; Intermediate Report of Trial Examiner Arthur Leff in *United Packinghouse Workers, AFL-CIO (Wilson & Co. Inc.)*, Case No. 17-CC-110, released Feb. 23, 1960.

Indeed, the instant case will to a large extent determine what the "present rules of law permitting picketing at the site of a primary labor dispute" are, and will have a vital impact not only upon the interpretation of the provisions of Section 8(b)(4) prior to the 1959 amendments but also upon the Act as now amended.

4. The Issue is of Utmost Importance.

The resolution of the conflict in decisions and of the question of federal law presented by the holding of the court below with respect to the extent to which striking employees may appeal to neutral employers in the course of primary picketing is of the utmost importance in the administration of Section 8(b)(4). The success of any strike depends upon the ability of striking employees to enlist the aid of other workers and the public generally, to lend them support in their dispute. Foremost among the traditional forms of aid is honoring the picket line and refusing to enter struck premises. By administrative decision the Board has emasculated the right of striking employees to seek such aid.

Since the issuance of the Board's decision in the instant case, there have been three additional decisions of which Petitioner is aware, issued by the Board applying this decision,[2] and two additional cases pending before the

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[2] *Local No. 36, International Chemical Workers Union (Virginia-Carolina Corp.)*, 126 NLRB No. 117; *United Steelworkers of America (Phelps Dodge Refining Corp.)*, 126 NLRB No. 168; *United Steelworkers of America (Tennessee Coal & Iron Division, United States Steel Corporation)*, 127 NLRB No. 97.

Board upon Trial Examiner's Intermediate Reports in which the rule of this case has been invoked by the General Counsel.[3] In one of the latter cases, the *Gonzalez* case, the General Counsel seeks to apply the decision in the instant case to preclude direct appeals to employees of neutral employers at a *single* common entrance to the primary employer's premises used by employees of both the primary employer and the neutral employers entering the primary employer's premises. In fact, as General Counsel's contentions in the *Gonzalez* case indicate, there is no logical basis in the Board's theory for distinguishing picketing at segregated gates from picketing at common gates. It is the Board's theory, here affirmed by the court below, that a direct approach to employees of neutral employers, no matter what the circumstances, is proscribed. Under this theory, there is no basis for distinguishing between inducements aimed at employees of neutral contractors coming to a primary employer's premises and those aimed at drivers and other employees of customers, suppliers, and transporters, coming to the employer's premises in the course of their employment on either a casual or regular basis. The logical and inevitable application of this interpretation of Section 8(b)(4) is a ban against all appeals at a struck employer's premises not narrowly limited to, and directed at, the employees of the struck employer. Such an interpretation, if permitted to stand, will severely restrict the right to strike guaranteed by Section 13 of the Act, as construed by this Court in the *Rice Milling* case. Such a restriction has impact upon every strike which may be conducted henceforth.

Even if the Board does not accept the logical extension of the doctrine sought in the *Gonzalez* case, it is a simple

[3] *United Packinghouse Workers (Wilson & Co. Inc.)* Case No. 17-CC-110, released Feb. 23, 1960; *Union De Trabajadores (Gonzalez Chemical Industries, Inc.)* Cases Nos. 24-CC-64, 24-CB-329, 24-CB-330, released Nov. 25, 1959.

matter for any employer to establish separate entrances for employees of neutral employers coming to a struck plant and thereby to negate the traditional rights of workers to ask fellow workers to support their strike.[4]

The importance of the issue raised in this case is further indicated by the fact that the Board's decision below represents a now admitted reversal of the Board's previous interpretation of Section 8(b)(4) which had been the view of the Board since the passage of the 1947 amendments to the Act. That interpretation appeared in the Board's decision in *United Electrical Workers (Ryan Construction Co.)*, 85 NLRB 417, cited by the Court in its *Rice Milling* decision, and based on facts strikingly similar to those in the instant case. While the Board's decision below was silent as to the *Ryan Construction* decision, in the subsequent *Virginia-Carolina Corp.* case, *supra*, the Board agreed with the Trial Examiner in that case that *Ryan Construction* was inconsistent with the instant case and overruled it to the extent of its inconsistency. The reversal of a long standing interpretation of the Act in this area critically affecting the right to strike warrants careful scrutiny and Supreme Court review.

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[4] The difficulty with the logic of its 8(b)(4) decisions pertaining to appeals to employees of neutral employers not to enter struck premises is evidenced by the Board's decision in *Chauffeurs Local No. 200 (Milwaukee Plywood Company)*, 126 NLRB No. 80. In that case the Board dismissed a complaint charging that Local 200 violated Section 8(b)(4) by advising its members to honor a picket line established by a sister local in connection with a primary dispute. A majority of the Board panel pointedly declined to rely on earlier Board decisions in *Interborough News Company*, 90 NLRB 2135, and *The Pure Oil Company*, 84 NLRB 315, which held that appeals to employees of neutral employers not to perform services at a primary employer's premises constitute traditional primary strike action. Indeed, the Board cited no precedent for its decision and made no effort to reconcile it with its decision in the instant case. It is unclear from the Board's decision what rationale it has adopted, and it would appear impossible to provide a rationale, in terms of the provisions of the Act, which logically distinguishes it from the Board's decision in the instant case.

Finally, the issue in this case raises a further important question of statutory interpretation implicit in the Board's decision. Under its prior interpretation of Section 8(b)(4) in similar situations, the Board had never found it necessary to pass upon the impact of the proviso to Section 8 (b)(4) which reads:

> "Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ."

As the Trial Examiner in this case observed, there is an obvious incongruity between the position adopted by the Board in this case and this proviso. Cf. *Interborough News Co.*, 90 NLRB 2135, 2146-9; *Teamsters, Local 87 (DiGiorgio Wine Company)*, 87 NLRB 720, 746. (J.A. 36.) This proviso was unchanged by the 1959 amendments to the Act. Its interpretation is of vital significance to the rights of employees under the Act and deserves full consideration at this stage of the administration of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted tha the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. SIGAL,
EDMOND F. ROVNER,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington 6, D. C.

Attorneys for Petitioner

HERBERT L. SEGAL,
403 Republic Building,
Louisville, Kentucky,

Of Counsel

AUGUST, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
GENERAL ELECTRIC COMPANY, INTERVENOR

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

Decided April 18, 1960

Mr. Benjamin C. Sigal, with whom *Mr. David S. Davidson* was on the brief, for petitioner.

Mr. Melvin J. Welles, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Gerard D. Reilly for intervenor.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

DANAHER, *Circuit Judge*: Respective counsel for Petitioner (Union) and the Respondent (Board) stipulated that the sole issue may be stated thus:

> "Whether, under the circumstances of this case, the Board properly concluded that petitioner by *picketing* Gate 3A of the General Electric 'Appliance Park' plant at a time when General Electric was engaged in a

labor dispute with the petitioner violated section 8(b)(4)(A) of the National Labor Relations Act, as amended."[1]

The Union has asked us to review and set aside, and the Board asks enforcement of, its order that the Union cease and desist from inducing or encouraging the employees of certain named contractors "or any other employer, except General Electric Company" to engage in a strike or a concerted refusal in the course of their employment to perform certain work or services where an object is to force or require such employers "or any other employer or person, to cease doing business with General Electric Company."

Intervenor, General Electric (Company) maintains a manufacturing plant at Appliance Park, Louisville, Kentucky, where it produces automatic washers, driers, dish washers and other household appliances. The Company during 1957 shipped in interstate commerce finished products valued in excess of $10 million. Some 13 plant buildings are located on a 1,000 acre tract, substantially square, with about 6,600 feet to the side. Surrounding the area is a ditch of such width and depth that vehicles can enter and leave the premises only on five roadways across culverts. At the entrance and on either side of each roadway are metal stanchions, between which a chain may be fastened to block the movement of vehicles during night hours and on non-working days. These entranceways numbered 2, 3, 3A, 4 and 5, are herein called "gates." To various classes of vehicles the Company's plant protection department, years before the events here critical, had issued stickers of varying size, shape and color. Each vehicle, whether that of a Company employee, or an employee of a contractor, a supplier or the like could readily be identified by the plant guards simply by examination of the type of sticker carried on the windshield. Employees of the Company had been authorized to use Gates 2, 3, 4 and 5, but *not* Gate 3A.

The Union in July 1958 called a lawful strike against

[1] 61 Stat. 141 (1947).

the Company. At that time the Company had some 10,500 employees at Appliance Park, of whom substantially more than one-half (possibly 7,600) were production and maintenance employees for whom the Union had been certified as bargaining representative. Picketing immediately commenced at all gates, *including* Gate 3A. The picketing was peaceful, the pickets carrying signs reading:

LOCAL 761
ON STRIKE
G.E. UNFAIR

The Company kept the plants open, and it was found that more than 2,000 employees represented by the Union continued to work during the strike as did many others not within the bargaining unit.

The Company at that time had outstanding various contracts with some 12 employers. Their jobs included installation, repair and alteration of equipment, converting machinery for products changeovers, retooling, rearrangement of conveyors, installation of presses and the like. Some employers were constructing a truck dock, erecting an air shelter, and laying in a mezzanine floor in one of the plant buildings. General maintenance work beyond the skills or the available manpower of the Company personnel engaged for that purpose was also let to outside contractors. Some of the work in the various collateral lines had been the subject of such contracts over a period of years.

In earlier experience, some 22 jurisdictional disputes among the craft union employees of the various contractors had resulted in picket lines at gates normally used by the Company employees, thus keeping out the General Electric employees as well as those of the contractors. By 1954, the Company had issued written instructions to its plant security people that use of Gate 3A was to be limited to the independent contractors and their employees, in order to eliminate interference with access by Company employees. Likewise, all contractors and their employees had been instructed to enter and to leave the Company premises only through Gate 3A. Thus, the Company had established Gate 3A for the sole and separate use of

the contractors and their employees at a point some 550 feet from the next nearest gate.

For some years signs at Gate 3A had carried posted notices of the limitation on permitted use, and at least since January, 1958, a large sign erected there had read:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
— ONLY —
G.E. EMPLOYEES
USE OTHER GATES

The trial examiner's discussion of the case, he said, was "based upon the premise that Gate 3-A was reserved exclusively for contractors, their employees and suppliers, and that the Respondent [Union], in picketing at that Gate, did not seek to solicit any of the Company's employees to cease work." Also he concluded that while the Union's appeal at Gate 3A was to secondary employees only, i.e., to employees of persons other than General Electric, the Union picketing there was part of "traditional primary strike action," and hence was for the same lawful object as the picketing at the other four gates. He recommended that the unfair labor practice complaint be dismissed, having concluded that section 8(b)(4)(A) does not protect the business of a neutral employer within the situs of a primary dispute.

The Board substantially adopted the findings of the trial examiner, but disapproved his opinion that the picketing at Gate 3A was "traditional" and was protected by the Act.

The Board found from the record as a whole that only the neutral contractors' employees were permitted to use Gate 3A as the Union was well aware. The Board concluded that the Union's object in picketing at Gate 3A was to "enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line." The Board therefore based its order on its conclusion that: "the Respondent violated Section 8(b)(4)(A)

of the Act by inducing and encouraging the employees of independent contractors to engage in a concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company."

We think the Board has correctly evaluated the findings of the trial examiner as well as its own. In any of these secondary boycott situations the ultimate determination turns upon the union's *objective*. Often "The line is fine,"[2] and circumstances of the particular case must supply the answer to which way the chips are to fall. Here the question may be stated: was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?

In the *Seafarers* case now relied upon by the Union, we considered such questions and found the union's exercise of its section 13[3] rights was not in violation of section 8(b)(4)(A). There, however, the pickets (1) identified themselves specifically as striking only their primary employer, (2) proclaimed by signs clearly showing that they had no dispute with the secondary employer, (3) distributed leaflets which explained in detail not only their own purpose and the reason picketing was conducted at the particular location, but especially excluded the secondary employer and its employees. Moreover the primary employer had placed its ship in the secondary employer's yards and only thereafter were its employees withdrawn; the ship had no other berth at which the union's organizational efforts might be publicized; and the vessel normally was at sea, months on end, with its crew shifts rotated and transported back and forth by helicopter. The operations as conducted by the primary employer not only had precluded the possibility of picketing the ship directly, but as evidence of the employer's purpose, the primary employer during the night placed a crew aboard the vessel and towed

[2] Seafarers International Union, Etc. v. NLRB, 105 U.S. App.D.C. 211, 216, 265 F. 2d 585, 590 (1959).

[3] 61 STAT. 151 (1947), 29 U.S.C. § 163 (1958).

it away. Such circumstances and such conduct, we concluded, made it clear that the union intended—not to shut down the neutral's operations, but to conduct lawful strike activities against the primary employer for the achievement of a protected objective.

The situation here is vastly different. When the strike was called in July 1958, the Union picketed all gates, including 3A. "Most, if not all, of the independent contractors' employees refused to cross the picket line, and did not work during the strike," the Board found. Pickets at Gate 3A in some cases refused neutral employees permission to get their tools. Others were told to get passes at the Union office. Others were told, in effect, to "Go on home." There was no showing that Company employees made any attempt to utilize Gate 3A. We need not detail additional items.[4] It is sufficient to note that the Board's findings do not lack support in substantial evidence on the record considered as a whole, and we are bound by those findings.[5]

This was no case of a union's seeking "to influence two employees of a customer of the mill not to cross the picket line."[6] Rather, the Board reasonably could find, as it did find, that the Union by peaceful picketing to be sure, but effectively nonetheless, sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform any services for their employers in the course of their employment and thus to force their employers to cease doing business with the Company.[7]

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[4] One Company employee testified that he had been permitted by a guard to enter that gate on one occasion after January, 1958. No others were shown to have done so. It fairly may be concluded that Company employees all but exclusively entered the premises at gates reserved for them. On the other hand, numerous employees of many independent contractors for years had been using only Gate 3A.

[5] Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 493 (1951).

[6] Labor Board v. Denver Bldg. Council, 341 U.S. 675, 687 (1951), interpreting the situation in Labor Board v. Rice Milling Co., 341 U.S. 665 (1951).

[7] Electrical Workers v. Labor Board, 341 U.S. 694, 701 (1951); Labor Board v. Denver Bldg. Council, 341 U.S. 675, 689 (1951); Retail Fruit & Veg. Clerks U. v. NLRB, 249 F. 2d 591, 599 (9 Cir. 1957); cf. Truck Drivers & Helpers v. NLRB, 101 U.S.App.D.C. 420, 249, F. 2d 512 (1957), *cert. denied*, 355 U.S. 958 (1958).

The objective of the picketing at Gate 3A as so found by the Board brings this case within the statute's range.[8] The "fine" line must be drawn in favor of the Board's order.

The order of the Board will be enforced.

[8] And see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113, 1114 (1960). Section 707, 73 STAT. 546, makes it clear that the 1959 Act has no applicability to the situation here.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959.

No. 15,205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
GENERAL ELECTRIC COMPANY, INTERVENOR.

Filed April 18, 1960. Joseph W. Stewart, Clerk.

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

ORDER

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this court that the order of the National Labor Relations Board on review in this case shall be enforced.

Pursant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Danaher.

Dated: April 18, 1960.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,205

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

GENERAL ELECTRIC COMPANY, INTERVENOR.

DECREE

Before: PRETTYMAN, *Chief Judge*; and WILBUR K. MILLER and DANAHER, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO to review and set aside an order of the National Labor Relations Board issued against Petitioner herein, its officers, representatives, agents, successors, and assigns on June 8, 1959, and upon the Board's answer and request for enforcement of said order. The Court heard argument of respective counsel on February 16, 1960, and has considered the briefs and the transcript of record filed in this cause. On April 18, 1960, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court, that the said order of the National Labor Relations Board be and the same is hereby enforced; and that said Petitioner, Local

761, International Union of Electrical, Radio and Machine Workers, AFL-CIO, its officers, representatives, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

s/ E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

s/ WILBUR K. MILLER,
Judge, United States Court of Appeals for the District of Columbia Circuit.

s/ JOHN A. DANAHER,
Judge, United States Court of Appeals for the District of Columbia Circuit.

Dated May 18, 1960.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 *et. seq.* provide as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents : . .

"(4)(A) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; . . .

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

(1570-1)